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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 197

GEORGE F. VASEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The majority and dissenting opinions of the court of appeals (Pet. App. 1-14; R. 70-81)[1] are reported at 222 F. 2d 3, 9.

JURISDICTION

The judgment of the court of appeals was entered on April 15, 1955 (R. 82). On June 3, 1955,

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[1] "R." refers to the transcript of record in two volumes, which we have numbered in pencil consecutively, pp. 1-84. "Tr." refers to the typewritten transcript of the testimony at the trial.

that court denied a petition for rehearing (R. 83). The petition for a writ of certiorari was filed on July 1, 1955. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court's remarks to the jury, after it had been sworn but before the beginning of the trial, concerning a verdict of acquittal by a different jury in a prior unrelated case constituted plain error under Rule 52(b), F. R. Crim. P.

2. Whether petitioner was entitled to a remand for a hearing before the trial court with respect to allegations, made for the first time in a petition for rehearing in the court of appeals, that he had been denied the effective assistance of counsel.

RULE INVOLVED

Rule 52(b), Federal Rules of Criminal Procedure, provides as follows:

> PLAIN ERROR. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

STATEMENT

Petitioner was charged in an indictment returned in the United States District Court for the Northern District of Illinois under counts 1, 2, 3, 4 and 7 with use of the mails in carrying out a scheme to defraud in violation of 18 U.S.C. 1341 (R. 5-17, 20); under counts 8, 9 and 10 with selling fraudulent, fractional undivided interests in oil and gas rights,

in violation of 15 U.S.C. 77q(a) (R. 21-23); and under count 11 with unlawfully using the mails to sell a certain security without a registration statement in violation of 15 U.S.C. 77e(a) (R. 24).[2] The jury found petitioner guilty as charged (R. 42). He was sentenced to imprisonment for five years on count 1, placed on probation as to the other counts for a period of five years to commence at the expiration of the sentence under count 1, and fined $25,000 in the aggregate (R. 44). On appeal (R. 54-55), the judgment was affirmed (R. 82).

On January 15, 1954, after the jury had been sworn and before the trial began, the court addressed the jury as follows (Tr. A-E):

> Now, Ladies and Gentlemen, we will have the opening statement by the Government. It just so happens that counsel for the defendant has a severe condition of laryngitis, and I will not impose upon him to give his opening statement this afternoon. We will then adjourn until one o'clock Monday when we will resume and have his statement and proceed with the case, putting on evidence.
>
> I apologize for the delay today, but since you were here I tried a number of cases; one of them we just finished today, involving a complicated matter. It just happened it ran over and I couldn't help it.

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[2] Counts 5, 6, and 12 were dismissed (Tr. 2317, 2321).

I think in fairness to this defendant I should say something to you Ladies and Gentlemen before this case starts. I do not want you people to get the impression that I as a judge have any notion about what you should do as members of the jury, and I am going to try to give this defendant a fair trial and give the Government a fair trial.

I have been practicing law and been a judge altogether over a period of upwards of twenty-seven years; about twenty-five of that as a lawyer. I have disagreed with a few juries, and not too much. I never criticized but one jury in my life, as a practicing lawyer or as a judge. Most of the decisions that I have seen since I have been a judge were just about the same as I would have rendered. I did criticize one, and some of you may know about it, and I do not regret that I did. If I had it to do over I would again, because in that particular case we had a man who sat here on the witness stand who was charged with robbery and admitted when he took the stand—he did not have to take the stand, but he took the stand and admitted himself that he had been convicted of larceny, and then he admitted that he had pleaded guilty to robbery before, and the jury saw four deputies necessary, sitting around him during the whole time.

When the evidence began to get pretty conclusive about the man at the bank who went to

the back door and looked out and saw a car bearing license that was the same number as was on this man's car, the same description of the car, and a man who resembled this man, was blond and gave a description, but too far away to identify him—when it began to get too warm he talked to his attorney and the attorney gets up and says: "Now, we'll admit that the car in which the robbery was done belonged to us, that it belonged to my client, that he had it in his possession immediately before the robbery, about thirty minutes, and that he had it in his possession immediately after the robbery. The only thing of it is my client went over to get a haircut while it happened."

And then the testimony further showed that he left a place way up on the north side at three-thirty, on Bosworth Avenue, 1300 something, he took his sister-in-law to her mother's —mind you, leaving at three-thirty—took his sister-in-law to her mother's at her address; then he took his sister-in-law's brother-in-law to this place where the haircut was to take place; then he took the car over to another place, turned it over to one of the two fellows who had testified that they were with him and held up the bank and used the guns, and that the car and the guns were furnished by him, and who are not in any way impeached—two much younger fellows—all of that—and the robbery was done and completed and the police were there at five minutes after four, in a

period of thirty-five minutes that he accomplished all of those many things.

It sounded to me like you would have had to have Aladdin's magic carpet to have moved around over the city of Chicago, because that was out on Harrison street, around Harrison Street and Crawford, and then still the car had to get over to Cicero where the robbery occurred. It was so impossible and improbable.

But I think in fairness to any defendant that I want you to know that I haven't got any preconceived notions. But in a case like that, a man that confesses that he was guilty of robbery but he just didn't do this one, and with such a flimsy excuse.

I make that statement because I want this defendant and I want the Government both to have a fair trial, and I do not want you to have any idea that I participated in or have any notions or am in the habit of criticizing juries about their decisions.

Counsel for the Government will proceed.

The trial began on January 18, 1954 (Tr. 1). On January 26 the following occurred (Tr. 898-899):

The COURT: Ladies and gentlemen of the jury, we have had a conference between counsel, and Mr. Swalwell's [petitioner's attorney] health is not too good. He is bringing in an associate counsel. Will you give your full name?

Mr. BURNS: Joseph F. Burns.

The COURT: Mr. Joseph F. Burns is joining Mr. Swalwell as co-counsel at this time and will participate in the trial.

Mr. Swalwell continued to cross-examine prosecution witnesses (Tr. 899, 927, 980, 1005, 1020, 1123, 1199, 1374, 1479, 1499, 1535, 1562, 1639, 1659, 2260); conducted the direct examination of defense witnesses (Tr. 1684, 1765, 1828, 1856, 1966, 1997, 2050, 2067, 2083, 2189); and made the closing argument to the jury (Tr. 2319). Mr. Burns cross-examined one prosecution witness (Tr. 1612); made a few objections at the trial (Tr. 973, 1109, 1219, 1572); objected to instructions (Tr. 2294-2298); and made a short argument supporting a motion for acquittal (Tr. 2312-2315).

In the final charge given on March 2, 1954 (Tr. 2312), the court instructed the jury *inter alia*:

> * * * Your duties make you the sole and exclusive judges of the facts. You must determine what the facts are from the evidence which is presented. In your deliberations you will, therefore, divest your mind of every fact and circumstance other than those disclosed by the evidence bearing upon the guilt or innocence of the defendant. [Tr. 2322-2323.]
>
> * * * * *
>
> You are instructed that the jury is the sole judge of the facts in this case * * *. And in

anything that the court may have said throughout the trial, or anything that the court may say in these instructions, the court has not intended, and he does not now intend to express any opinion (on) the facts of the case, on the credibility of the witnesses, or the weight to be given their testimony. [Tr. 2341.]

* * * * *

* * * If there is any reasonable hypothesis based upon the consideration of the whole evidence in the case and consistent therewith, upon which you can acquit the defendant in this case, then it is your duty to take such hypothesis and to find the defendant not guilty, for it is not your duty to look for some theory upon which you can convict the defendant, but on the contrary it is your duty, and the law requires you, if you can consistently and reasonably do so, to reconcile any and all circumstances, and the whole evidence of the case, with the innocence of the defendant, and if by so doing, the innocence of the defendant appears, or if a reasonable doubt of the guilt of the defendant arises, the jury must acquit the defendant. [Tr. 2329-2330.]

ARGUMENT

1. Petitioner contends (Pet. 13-22) that the court below erred in concluding that the trial court's remarks about another case before trial, to which no objection was made at the trial, were not of such nature as to require reversal of the judgment of conviction under Rule 52(b).

Even though the judge's remarks may have been "injudicious" and "indiscreet", as the majority below observed (Pet. App. 5), they were not of such nature as to constitute plain error under Rule 52. Cf. *Lehman* v. *District of Columbia,* 19 App. D.C. 217, 226-231; *Anderson* v. *Commonwealth,* 144 Va. 544, 548; *State* v. *Little,* 174 N.C. 793, 795-796. The judge was speaking of a verdict in a robbery case tried before him about one month previously, involving charges entirely different from those in the instant case. Nowhere in the text of his comments is there any suggestion of an expression of opinion as to petitioner's guilt or innocence. The judge merely made it clear that, if the jurors had perchance read or heard of his criticism of the other jury, they were not to let that influence them in their deliberations. A review of the record herein reveals no statement of "views harbored by the presiding judge" (see dissent below, Pet. App. 11), which might have influenced the jury in their deliberations for fear of criticism by the judge. He disavowed "any preconceived notions", and concluded, "I make that statement because I want this defendant and I want the Government both to have a fair trial, and I do not want you to have any idea that I participate in or have any notions or am in the habit of criticizing juries about their decisions" (Tr. E).

Moreover, in the final charge, some six weeks later, the jurors were instructed that they were the sole judges of the facts; that they should divest their minds of every fact and circumstance other

than those disclosed by evidence concerning the guilt or innocence of petitioner; that the judge did not intend to express any opinion on the facts of the case, the credibility of the witnesses, or the weight to be given their testimony; and that if there was any reasonable hypothesis based upon all the evidence upon which they could acquit the petitioner, they should do so. Statement, *supra*, pp. 7-8. The jurors thus were carefully instructed that they were to reach their verdict by the free and independent exercise of their minds without interference by the judge.

The fact that the preliminary comments of the judge were not objected to at the time is significant as tending to show that, in the context of the place and time and in the light of the demeanor of the trial court, they were not regarded by petitioner as prejudical. For an alleged error to be noticed under Rule 52(b), F. R. Crim. P., it must be seriously prejudical, affect substantial rights, and be capable of resulting in a miscarriage of justice. *United States* v. *Kirby*, 176 F. 2d 101, 104 (C.A. 2); *United States* v. *Jones*, 204 F. 2d 745, 749 (C.A. 7), certiorari denied, 346 U.S. 854; *Himmelfarb* v. *United States*, 175 F. 2d 924, 950-951 (C.A. 9), certiorari denied, 338 U.S. 860. Petitioner has not demonstrated that the judge's challenged remarks, even if error, were of sufficient gravity to constitute reversible error under Rule 52(b).[3]

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[3] Decisions cited by petitioner as being in conflict with the decision below are not apposite. *Brasfield* v. *United States*,

2. On his original appeal to the court of appeals, petitioner argued that he had been deprived of a fair trial because of the illness of his original counsel (see Pet. 8a). In a petition for rehearing in that court, he asserted for the first time that he had been denied the effective assistance of counsel and requested the court to remand the cause for a hearing on that question in the district court. He alleged that if given the opportunity, he could prove the facts now set forth at pages 10-13 of his petition to the effect (1) that defense attorney Swalwell had never intended to try the case because of illness, and was forced to trial without adequate preparation; and (2) that the trial court did not question petitioner as to his alleged financial inability to employ counsel or advise him of his right to have counsel appointed. The petition for rehearing was denied (R. 83).

Petitioner argues that under the procedure authorized in *Butzman* v. *United States*, 205 F. 2d 343, 351 (C.A. 6), certiorari denied, 346 U.S. 828, he should have been permitted to prove his allegations at a district court hearing before the court of appeals acted on his petition for rehearing. But clearly the court below did not abuse its discre-

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272 U.S. 448, involved an improper request by the trial judge of a divided jury as to their numerical division. *Bollenbach* v. *United States*, 326 U.S. 607, was concerned with a prejudicial last minute instruction, delivered after the jury had been unable to agree upon a verdict. In *Quercia* v. *United States*, 289 U.S. 466, a trial judge's comment that he thought the defendant was lying because he wiped his hands during his testimony, was held prejudicially erroneous.

tion in refusing to suspend its judgment of affirmance on the basis of petitioner's belated contentions. Petitioner presented no facts which would support his claim that he was denied the effective assistance of counsel. When an accused appears for trial with counsel of his choice, the trial court is not required to investigate his ability to pay an attorney's fee, and then advise him that the court will appoint a different attorney if he wishes one. Petitioner had no trouble obtaining a $10,000 appeal bond (R. 47, 51) and producing out of town witnesses to testify on his behalf. The record discloses a vigorous and competent defense of petitioner's case by Mr. Swalwell, who continued to the end of the trial as the more active counsel even after Mr. Burns entered the case as associate counsel. See Statement, *supra,* pp. 6-7; Pet. App. 8. Moreover, it should be noted that the judgment of the court below does not foreclose a judicial test of petitioner's belated contentions by motion under 28 U.S.C. 2255.

CONCLUSION

The judgment of the court below is correct and there is no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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